No. 14,853

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM V. BOGGESS, as Protestant on behalf of the City of Fairbanks, Alaska, and THE CITY OF FAIRBANKS, ALASKA,

Appellants,

vs.

BERRY CORPORATION, STEVE BOINICH, and UNITED STATES OF AMERICA,

Appellees.

Appeal from the District Court for the District of Alaska, Fourth Division.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

I.

REPLY TO SECTION I OF ARGUMENT OF APPELLEE UNITED STATES.

The appellee United States contends, in the first section of its argument, and it may well be true, that the Court below has no discretion to refuse the transfer of a liquor license * * * that its function with reference to transfer is merely ministerial. Upon

that predicate the government concludes that this Court has no authority to review an "administrative decision."

If we assume the correctness of the predicate, the conclusion does not necessarily follow. When the Court below ordered a transfer of the subject license it judicially construed the statutory content of the word "transfer" as embracing a change of location of the licensed premises. In fact, a written opinion was rendered on that very subject. When administrative duties are delegated to a court it behooves that court to judicially determine the extent of its authority. An order issued pursuant to such duty presupposes such a determination whether express or not.

The Government's argument is hypertechnical. It is worshipping at an altar of forms or labels. It fails to recognize the difference between review of a decision or order of an administrative agency and an administrative decision of a court.

The consequences of such failure, if the Court in this case approves the Government's position, are considerable. If an administrative agency acts without or exceeds its statutory authority, an aggrieved litigant may obtain equitable relief or relief by way of extraordinary remedy by application to the District Court. A denial of that relief would, of course, be subject to judicial review by this Court. Obviously, no such remedies are available to a litigant where the District Court itself acts administratively and passes judicially on the extent of its own admin-

istrative powers. To hold such a determination not subject to judicial review by this Court is to hold that the Territorial Legislature may circumvent the jurisdiction of this Court by the simple device of administrative delegation to the District Court. This the Territorial Legislature certainly cannot do. *Hauptman v. United States,* 43 F. (2d) 86.

The authority of this Court to review by appeal the administrative determinations of the District Court of Alaska may be implied from the decisions of this Court in *Town of Fairbanks, Alaska v. Barrack, et al.,* 282 F. 417, and *Town of Fairbanks, Alaska v. United States Smelting, Refining & Mining Co., Inc., et al.,* 186 F. (2d) 126. In the former case it was held in an annexation proceeding that "creation of municipalities, and the defining of the extent of the boundaries thereof, involve the exercise of legislative, not judicial, power." In the latter case, this Court reviewed on appeal a judgment of the District Court for the District of Alaska dismissing a petition for annexation of territory by a municipality. It follows that this Court, in fact, reviewed an administrative decision as a "final decision" within the purview of 28 U.S.C.A. 1291 under the holding in the *Barrack* case that annexation is a legislative function.

Undecided to date is the collateral question of the authority of the Territorial Legislature to impose upon the District Court for the District of Alaska any legislative or administrative duties. This Court expressed doubt upon that subject in the *Barrack*

case, *supra,* and the late Judge Dimond was of the opinion that such attempted delegation would be invalid in *In re Alaska Labor Trades Ass'n.,* 10 Alaska 472.

As another facet of the first section of its argument, the appellee United States points out that the remedy of appeal "is entirely inadequate for the license, by statute, will expire at the end of one year (December 31, 1955). (35-4-19, ACLA, 1949)"

The question here involved is one of extreme public importance in the Territory of Alaska. If, as the United States contends, the District Court has the authority to transfer licenses from one location to another within the corporate limits of municipalities and, indeed, has no discretion to refuse to do so upon application therefor, then the choice of municipalities as to license location will be effectively curtailed. Such transfers will be frequently effected in order to avoid City disapproval of an original application. Indeed a City ordinance regulatory of location might be held invalid as in conflict with such absolute right of transfer. Since the question on appeal is of substantial public importance, involves the construction of a public statute, involves the extent of the authority of the court below, and may frequently arise, it is submitted that it should be decided by this Court even though it may become technically moot pending appeal. See the decision of this Court in *Boise City Irrigation & Land Co. v. Clark,* 131 F. 415. Also *Van de Vegt v. Larimer County,* 98 Colo. 161, 55 P. (2d) 703.

Another reason for determination of the question on appeal lies in the very inadequacy of the remedy of appeal as stated by the Government. Where a matter is of public interest and it is difficult to obtain a determination thereof prior to its becoming moot, it should be determined on appeal. *Close v. Southern Maryland Agri. Asso.,* 134 Md. 629, 108 A. 209, and *Doering v. Swoboda,* 214 Wis. 481, 253 N.W. 657.

II.

REPLY TO SECTION II OF ARGUMENT OF APPELLEE UNITED STATES.

With reference to the second section of the argument of the appellee United States, the question on appeal is not whether or not the court below abused its discretion by consenting to the transfer of the appellee Boinich's license from location to location as stated, but whether or not it had any authority to do so. Particularly is this true if the court below acts ministerially in approving such transfer. Both the United States and the court below conclude that "nothing in the liquor law requires that the transferee conduct his business upon the same premises as originally occupied by the licensee." Such reasoning is negative. It is an attempt to justify an act as authorized because there is no prohibition against it. As is evident from the Government's brief and the action of the court below, this authority produced

from vacuum requires the creation of a procedure to effectuate it.

Dated, Fairbanks, Alaska,
December 14, 1955.

Respectfully submitted,
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Attorney for Appellants.